

(i) Is presented by a national, or a corporation controlled by a national, of a country at war or engaged in armed conflict with the United States, or any country allied with such enemy country unless the appropriate settlement authority determines that the claimant is, and at the time of the incident was friendly to the United States. A prisoner of war or an interned enemy alien is not excluded from filing a claim for damage, loss, or destruction of personal property within the federal government's custody if the claim is otherwise payable.

(j) Is for damages or injury, the claim for which a receiving State should adjudicate and pay pursuant to an international agreement, subject to waiver by the Commander USARCS. See DA Pam 27-162, paragraph 3-4a(2), for a discussion of the conditions of waiver.

(k) Is listed in §§ 536.45 and 536.46, except for the exclusions listed in §§ 536.45(e), (h) and (k). Additionally, the exclusions set forth in §§ 536.45(a) and (b) do not apply to a claim arising incident to noncombat activities.

(l) Is brought by a subrogee.

(m) Is covered by insurance on the involved U.S. Armed Forces' vehicle or the tortfeasor's privately owned vehicle (POV), in accordance with requirements of a foreign country, unless the claim exceeds the coverage or the insurer is insolvent. See § 536.139(c).

(n) Is payable under subpart C of this part or AR 27-20, chapter 11.

(o) Is brought by or on behalf of a member of a foreign military force for personal injury or death arising incident to service, or pursuant to combined military operations. Combined military operations include exercises and United Nations and North Atlantic Treaty Association (NATO) peace-keeping and humanitarian missions. Derivative claims arising from these incidents are also excluded.

**§ 536.139 Applicable law for claims under the Foreign Claims Act.**

(a) *Venue of incident and domicile of claimant.* In determining an appropriate award, apply the law and custom of the country in which the incident occurred to determine which elements of damages are payable and which individuals are entitled to compensation. However,

where the claimant is an inhabitant of another foreign country and only temporarily within the country in which the incident occurred, the quantum of certain elements of damages, such as lost wages and future medical care, may be calculated based on the law and economic conditions in the country of the claimant's permanent residence. Where the decedent is the subject of a wrongful death case, the quantum will be determined based on the country of the decedent's permanent residence regardless of the fact that his survivors live in the U.S. or a different foreign country than the decedent. See § 536.77 for further damages guidance.

(b) *Other guidance.* The guidance set forth in §§ 536.77(b) through (d) as to allowable elements of damages is generally applicable. Where moral damages, as defined in DA Pam 27-162, paragraph 2-53c(4), are permitted, such damages are payable. In some countries it is customary to get a professional appraisal to substantiate certain claims and pass this cost on to the tortfeasor. The Commander USARCS or the chief of a command claims service may, as an exception to policy, permit the reimbursement of such costs in appropriate cases. Where feasible, claimants should be discouraged from incurring such costs.

(c) *Deductions for insurance.* (1) Insurance coverage recovered or recoverable will be deducted from any award. In that regard, every effort will be made to monitor the insurance aspect of the case and encourage direct settlement between the claimant and the insurer of the tortfeasor.

(2) When efforts under paragraph (c)(1) of this section are of no avail, or when it otherwise is determined that an insurance settlement will not be reasonably available for application to the award, no award will be made until the chief of the command claims service or the Commander USARCS, has first granted consent. In such cases, an assignment of the insured's rights against the insurer will be obtained and, in appropriate cases, reimbursement action will be instituted against the insurer under applicable procedures.

(3) If an insurance settlement is not available due to the insurer's insolvency or bankruptcy, a report on the bankruptcy will be forwarded to the Commander USARCS without delay, setting forth all pertinent information, including the alleged reasons for the bankruptcy and the facts concerning the licensing of the insurer.

(d) *Deductions for amounts paid by tortfeasor.* Settlement authorities will deduct from the damages any direct payments by a member or civilian employee of the U.S. armed forces for damages (other than solatia).

**§536.140 Appointment and functions of Foreign Claims Commissions.**

(a) Claims cognizable under this subpart will be referred to the command responsible for claims arising within its geographic area of responsibility, including claims transferred by agreement between the services involved. The senior judge advocate of a command having a command claims service, or his delegate, will appoint a sufficient number of Foreign Claims Commissions (FCCs) to dispose of the claims. If there is no command claims service, the responsible commander may ask the Commander USARCS for permission to establish one. Otherwise, the Commander USARCS will appoint a sufficient number of FCCs from personnel furnished by the command involved. See §576.3(d) for more information about command claims services.

(b) The Commander USARCS will appoint all other FCCs to act on all other claims, regardless of where such claims arose, unless they arose in a country for which single-service responsibility has been assigned to another service. FCCs appointed by the Commander USARCS at units based in the continental United States (CONUS) may act on any claim arising out of such unit's operations. Any FCC operating in, or adjudicating claims arising out of, a geographical area within a command claims service's jurisdiction, will comply with that service's legal and procedural rules.

(c) An FCC may operate as an integral part of a command claims service, which will determine the cases to be assigned to it, furnish necessary administrative services, and establish

and maintain its records. Where an FCC does not operate as part of a command claims service, it may operate as part of the office or a division, corps or higher command staff judge advocate (SJA), which will perform the foregoing functions.

(d) An appointing authority who appoints or relieves an FCC whom he or she has appointed will forward one copy of each order addressing an FCC's appointment, relief, or change of responsibility to the Commander USARCS. Upon receipt of an initial appointing order, the Commander USARCS will assign an office code number to the FCC. Without such a number the FCC has no authority to approve or pay claims. See AR 27-20, paragraph 13-1.

(e) Normally, the FCC is responsible for the investigation of all claims referred to it, using both the procedures set forth in subpart B of this part and any local procedures established by the appointing authority or command claims service responsible for the geographical area in which the claim arose. Chiefs of a command claims service may request assistance on claims investigation within their geographical areas from units or organizations other than the FCC. The Commander USARCS may make the same request for any claim referred to an FCC appointed under his or her authority.

(f) When an FCC intends to deny a claim, or offer an award less than the amount claimed, it will notify in writing the claimant, the claimant's authorized agent, or legal representative of the intended action on the claim and the legal and factual bases for that action. If the FCC proposes a partial award, a settlement agreement should be enclosed with the notice. Claimants will be advised that they may either accept the FCC action by returning the signed settlement agreement or, if dissatisfied with the FCC's action, they may submit a request for reconsideration stating the factual or legal reasons why they believe the FCC's proposed action is incorrect. This notice serves to give the claimant an opportunity to request reconsideration of the FCC action and state the reasons for the request before final action is